

IN THE  
**Supreme Court of the United States**  
October Term, 1965

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JOHN F. DAVIS

**No. 210**

JAMES T. STEVENS,

*Petitioner,*

—v.—

CHARLES A. MARKS, Justice of the Supreme Court  
of New York, County of New York,

*Respondent.*

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE  
SUPREME COURT, FIRST JUDICIAL DEPARTMENT IN  
THE COUNTY OF NEW YORK

**No. 290**

JAMES T. STEVENS,

*Petitioner,*

—v.—

JOHN J. McCLOSKEY, Sheriff of New York City,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE**

HERMAN VAN DER LINDE  
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*Attorneys for Superior Officers  
Council of City of New York  
Police Department, Movant-  
Amicus Curiae.*

IN THE  
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**MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE**

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*To the Honorable the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

The Superior Officers Council of City of New York Police  
Department respectfully moves for permission to file a  
brief in this case as amicus curiae in support of the position  
of the above named petitioner James T. Stevens.

We have received written permission, from the respective counsel for each of the above named parties, to file such a brief *amicus curiae* in this case. Annexed to this motion is a copy of the letter of permission dated December 22, 1965 from Hon. Frank S. Hogan, District Attorney, New York County, counsel for both of the above named respondents; and a copy of a like letter of permission, dated December 22, 1965, from Eugene Gressman, Esq., co-counsel for the above named petitioner.

The reason why we are making this motion for permission by the Court to file our brief *amicus curiae*—i.e., the reason why we are not presuming to file our brief *amicus curiae* solely on the strength of the written permission of the parties—is that our *amicus curiae* brief is not “presented within the time allowed for the filing of the brief of the parties supported” (Rule 42(2)). This motion, then, is in the nature of an application for an order waiving the time requirement of Rule 42. It is respectfully urged that such application is worthy because we believe that the legal issues of this case cannot be thoroughly considered by the Court without the items presented in our *amicus curiae* brief.

Before describing the contents of our *amicus curiae* brief which we believe merit its acceptance even for late filing, we pause to recite the interest of the *amicus curiae*.

The organization known as the Superior Officers Council of City of New York Police Department is composed of four associations of New York City superior police officers, namely, Captains Endowment Ass’n, Lieutenants Benevolent Ass’n, Sergeants Benevolent Ass’n, and Detectives Endowment Ass’n. These four associations composing the

Superior Officers Council are concerned with the job security and financial welfare of their individual members, all of whom are police officers of the respective ranks indicated in the names of the four associations. We therefore have a direct interest in the case of the above named petitioner, James T. Stevens, who is in effect testing before this Court the constitutionality of his dismissal from office as a New York City police lieutenant, as a penalty for his refusal to surrender his constitutional privilege against self incrimination before a State Grand Jury; albeit the case comes to this Court upon review of convictions for contempt.

Returning now to the contents of our brief *amicus curiae* as justifying the granting of this motion because of the usefulness of our legal presentation for the rendering of a correct decision in this case: Throughout the course of this case thus far, in both the State and Federal courts, the dispositive ground of decision against petitioner Stevens has been that *Regan v. New York*, 349 U.S. 58, is controlling against Stevens' position in the contempt prosecutions. However, it appears that all of the courts which have rendered decisions or written opinions thus far in this litigation have overlooked the important fact that the New York immunity statute (N.Y. Penal Law §381) which was deemed controlling in the *Regan* case is radically different from the New York immunity legislation (N.Y. Penal Law §381 as amended, plus N.Y. Penal Law §2447) which is operative in the instant case. The New York immunity statute in *Regan* was of the "automatic" or self-executing type, that is, the giving of testimony automatically cloaked the witness with immunity; whereas the herein operative New York immunity legislation is discretionary and selective in operation

and the immunity thereunder does not attach until quite specifically prescribed procedures are first had—these procedures have not been had at all in this case. This Court was able to affirm the contempt conviction in *Regan* because the petitioner in that case had automatic immunity and was therefore held to have no possible justification for refusing to testify. But in the instant case, under the amended New York immunity legislation, the petitioner Stevens is a long way from any assured expectancy of immunity.

As above mentioned, all of the State and Federal courts which have thus far sat in the instant case were apparently unaware of this change in the New York immunity legislation; at least they have apparently been unaware of its effect in regard to the analysis of the *Regan* decision as being the supposedly controlling precedent for this case; there is no mention in any of the court opinions below in this case of the statutory change to which we refer.

It is apparently true also that the parties in this litigation thus far have not been aware of the effect of the above mentioned statutory change as applied to this case, or apparently of the existence of the change, for apparently the parties have not mentioned said change in their arguments and briefs—subject to the qualification that we have not yet seen the brief of the respondents in this Court; but in any event the point should be developed for the petitioner Stevens, whom it aids.

Our amicus curiae brief treats also another important point whose analytical relevance to this case has not, apparently, thus far come to the attention of the parties or of any of the Courts below. We refer to the New York decisional rule of constitutional law that, aside from

statute, the compelling of grand jury testimony from a prospective defendant works a breach of his privilege against self incrimination and requires dismissal of any indictment based on or derived from such testimony. If this phase of the law of New York is not thoroughly presented for the Court's consideration in the instant case there is a danger of arriving at the erroneous conclusion that, notwithstanding the statutory change from automatic to selective immunity, petitioner Stevens still gets "automatic" immunity under the rule of decisional law above referred to. Such a conclusion would be erroneous because, as we demonstrate in our amicus curiae brief, this supposed "automatic immunity" is not only an incomplete "immunity" on the State level itself, but it is also apparently ineffective to generate the accompanying Federal immunity required under *Murphy v. Waterfront Commission*, 378 U.S. 52.

It is therefore respectfully submitted that the points presented in our brief amicus curiae, being believed to be essential for a correct decision in this case and being apparently not likely to be available from the presentations of the parties themselves (and being absent also from the opinions of the Court below), are of such importance as to justify the Court in receiving our brief notwithstanding its lateness under Rule 42.

We submit also that our lateness in itself should not be regarded as inexcusable. The scheduling of the case in this Court has been on an expedited basis, we are informed. As a non-party we have been handicapped in obtaining access to the papers in the case. Furthermore, the seeming importance of the legal points which we have presented

in our brief amicus curiae has caused us to feel that we are under a special responsibility to try to make sure that our presentation is as legally correct as we can make it, and this could not be hurried.

Wherefore, it is respectfully prayed that this motion for permission to file a brief amicus curiae in support of the petitioner James T. Stevens in this case be granted.

Respectfully submitted,

HERMAN VAN DER LINDE

ABRAHAM GLASSER

*Attorneys for Superior Officers  
Council of City of New York Police  
Department, Movant-Amicus Curiae*

[Copies of the letters of permission from the parties follow.]

**Letter of Permission from Respondents' Counsel**

**DISTRICT ATTORNEY**

**THE**

**COUNTY OF NEW YORK  
155 Leonard Street  
New York 13, N. Y.  
REctor 2-7300**

**FRANK S. HOGAN  
DISTRICT ATTORNEY**

**December 22, 1965**

**Mr. Herman VanderLinde  
445 East 161st Street  
Bronx, New York 10451**

**Re: Supreme Court of U. S.  
October Term—1965  
No. 210 STEVENS v. MARKS  
No. 290 STEVENS v. McCLOSKEY**

**Dear Mr. VanderLinde:**

Permission is hereby granted for your office to file an Amicus Curiae brief for the Superior Officer's Council, Police Department City of New York in behalf of the Petitioner, James T. Stevens.

**Very truly yours,**

**/s/ FRANK S. HOGAN  
Frank S. Hogan  
District Attorney  
New York County**

**Per /s/ MICHAEL R. STACK  
Michael R. Stack  
Assistant District Attorney**

**MRS:cn**

**cc: John P. Schofield, Esq.  
231 West 96th Street  
New York 25, New York**



**Letter of Permission from Petitioners' Counsel**

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December 22, 1965

Herman J. Van der Linde, Esq.  
445 East 161st Street  
Bronx, New York 10451Re: *Stevens v. Marks*, No. 210,

Oct. Term 1965

*Stevens v. McCloskey*, No. 290,

Oct. Term 1965

Dear Mr. Van der Linde:

As co-counsel for the petitioner, James T. Stevens, in the above-entitled cases now pending in the Supreme Court of the United States, I hereby consent to the filing of an amicus curiae brief on behalf of the Superior Officers Council, Police Department of the City of New York.

Sincerely yours,

EG/sja

/s/ EUGENE GRESSMAN  
Eugene Gressman